

'Nuon'

Neutral Citation Number: [2013] EWHC 2847 (Admin)

Paragraph 25 states that in the context of non-physical or indirect harm, the yardstick for 'substantial harm' is effectively the same as for physical harm, that it would be an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced.

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CO/9953/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 26 July 2013

B e f o r e :

MR JUSTICE JAY

Between:

BEDFORD BOROUGH COUNCIL_

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

First Defendant

NUON UK LTD

Second Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Mr T Cosgrove (instructed by Bedford Council Legal Department) appeared on behalf of the **Claimant**

Mr A Newcombe QC (instructed by Bond Dickinson) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved by the Court)

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23. Mr Newcombe QC accepted that the meaning would have been even clearer had the words "to significance" been interpolated after "substantial harm" in that final sentence, but I agree with him that their absence does not alter the sense. The inspector clearly had in mind substantial harm to the setting. Not merely does he say that expressly, the whole appeal before him was not about physical harm.
24. At one stage I was attracted by Mr Cosgrove's submission that the inspector was falsely comparing the physical with the non-physical, and by using the formulation "something approaching demolition or destruction", he was applying a concept which was solely apt to the case of physical harm. However, this is an incorrect reading of the inspector's decision. On further analysis, I agree with Mr Newcombe that the inspector was not setting up a dichotomy. He was applying a unitary approach to a unified concept of significance. What the inspector was saying was that for harm to be substantial, the impact on significance was required to be serious such that very much, if not all, of the significance was drained away.
25. Plainly in the context of physical harm, this would apply in the case of demolition or destruction, being a case of total loss. It would also apply to a case of serious damage to the structure of the building. In the context of non-physical or indirect harm, the yardstick was effectively the same. One was looking for an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced.
26. Although Mr Cosgrove did not put his argument quite in this way, I have considered whether the formulation "something approaching demolition or destruction" is putting the matter too high in any event. "Substantial" and "serious" may be regarded as interchangeable adjectives in this context, but does the phrase "something approaching demolition or destruction" add a further layer of seriousness as it were? The answer in my judgment is that it may do, but it does not necessarily. All would depend on how the inspector interpreted and applied the adjectival phrase "something approaching". It is somewhat flexible in its import. I am not persuaded that the inspector erred in this respect.
27. Further, I consider that there is merit in Mr Newcombe's subsidiary point that Mr Cosgrove has abstained from saying what the correct test is.
28. Mr Newcombe's fallback submission was that even if the inspector erred, I should confidently conclude that the result was the same. The outcome was congruent with the statement of common ground and naturally flowed from all the evidence in the case, including, he submitted, CLOWD's less than persuasive expert evidence primarily dedicated to landscaping issues. However, if I had been against the second respondent on ground 1, I would not have concluded that the case falls within the exceptional category of case where the court could be satisfied that no reasonable inspector could have reached a different conclusion. So the first ground fails on the law rather than on discretion.
29. The claimant's second ground is substantially parasitic on ground 1, save that Mr Cosgrove submits that the inspector failed to have regard to the fourth sentence of